Vital Living Empire Sdn Bhd & Ors v Satis Kumar & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCVC-123–08 OF 2023
SUZANA MUHAMAD SAID JC
6 JUNE 2024

Civil Procedure — Striking out — Appeal against order allowing striking out — Arrears of rental — Whether there was second contract with binding settlement conditions — Whether there was uncertainty of date on existence of second contract — Whether defendants correctly joined as party to suit — Whether there was privity of contract between plaintiff and defendants — Whether suitable case to be struck out

This was an appeal against the decision of the sessions court judge ('SCJ') in allowing the second, third and fourth defendants' application to strike out the plaintiff's writ of summons and statement of claim ('SOC') under O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012 ('the ROC'). The first defendant was the owner of two premises ('the said premises'). The second defendant was an employee of Messrs. Ngeow & Tan ('firm') while the third defendant was a partner of the firm. The first plaintiff rented the said premises from the first defendant on 24 December 2020 and 15 December 2021, respectively ('tenancy agreements'). The second plaintiff and the third plaintiff were directors of the first plaintiff. The first plaintiff received a notice of demand for the sum of RM287,299.20 for the arrears in rental from the firm as the solicitors representing the first defendant. This resulted in the third plaintiff visiting the firm's office and meeting the second defendant to request for a longer period to settle the arrears. The next day, the third plaintiff again, visited the firm's office and left a letter of guarantee was signed by the second plaintiff and the third plaintiff as guarantors. Subsequently, the plaintiffs in their SOC stated that there was a contract made between the first plaintiff and first defendant on either 1 September 2022 or 2 September 2022, which was referred as the 'second contract' in the SOC and the settlement conditions were binding upon the first defendant. On the other hand, it was the contention of the defendants that the first plaintiff and first defendant had never reached into any agreement to resolve or settle their disputes in respect of the outstanding rentals.

Held, dismissing appeal with costs:

(1) The plaintiffs brought this action and sued the second, third and fourth defendants, to be held liable for the third defendant pertaining to a settlement proposal which according to the plaintiffs, could either be on

A 11 September 2022 or 2 September 2022. It was apparent, that the plaintiffs themselves were not certain about the date of the 'second contract'. Further, it was contradictory for the plaintiffs to say that there was an element of fraud that forced second plaintiff and the third plaintiff to sign the letter of undertaking and yet still claimed that a binding B contract known as the 'second contract' was formed on that meeting of 1 September 2022 or 2 September 2022 at the firm. Obviously, further negotiations for settlements were made thereafter, but not concluded (see paras 17–19).

C (2) The second and third defendant were only acting upon instructions of the first defendant, being the firm's client, in regards to the rental in arrears owed by the first plaintiff to the first defendant. Furthermore, the second, third and fourth defendants were not privy to the tenancy agreements between first plaintiff and first defendant. In regard to the D fourth defendant, it was also obvious that the fourth defendant was not a partner of the firm since he left the firm, before the commencement of this suit. Thus, the fourth defendant should not be named as a party. As such, it was plainly obvious that this was a case suitable for O 18 r 19 of the ROC as decided by the SCJ (see paras 20–21 & 23–24).

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[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen ('HMS') dalam membenarkan permohonan defendan kedua, ketiga dan keempat untuk membatalkan writ saman dan pernyataan tuntutan plaintif ('PTP') di bawah A F 18 k 19(1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Defendan pertama adalah pemilik dua premis ('premis tersebut'). Defendan kedua adalah pekerja di Tetuan Ngeow & Tan ('firma') manakala defendan ketiga adalah rakan kongsi firma itu. Plaintif pertama menyewa premis tersebut G daripada defendan pertama masing-masing pada 24 Disember 2020 dan 15 Disember 2021 ('perjanjian penyewaan'). Plaintif kedua dan plaintif ketiga adalah pengarah plaintif pertama. Plaintif pertama menerima notis tuntutan dalam jumlah RM287,299.20 untuk tunggakan sewa daripada firma sebagai peguamcara yang mewakili defendan pertama. Ini menyebabkan plaintif H ketiga melawat pejabat firma dan bertemu dengan defendan kedua untuk meminta tempoh yang lebih lama untuk menjelaskan tunggakan. Keesokan harinya, plaintif ketiga sekali lagi, melawat pejabat firma dan meninggalkan surat jaminan yang ditandatangani oleh plaintif kedua dan plaintif ketiga sebagai penjamin. Selepas itu, plaintif dalam PTP mereka menyatakan bahawa I terdapat kontrak yang dibuat antara plaintif pertama dan defendan pertama sama ada pada 1 September 2022 atau 2 September 2022, yang dirujuk sebagai 'kontrak kedua' dalam PTP dan syarat penyelesaian mengikat defendan pertama. Sebaliknya, ia adalah pendapat defendan bahawa plaintif pertama dan defendan pertama tidak pernah mencapai sebarang persetujuan untuk

menyelesaikan atau memuktamadkan pertikaian mereka berkenaan dengan sewaan tertunggak.

Diputuskan, menolak rayuan dengan kos:

(1) Plaintif membawa tindakan ini dan menyaman defendan kedua, ketiga dan keempat, untuk dipertanggungjawabkan ke atas defendan ketiga berkaitan dengan cadangan penyelesaian yang menurut plaintif, sama ada pada 11 September 2022 atau 2 September 2022. Ia adalah jelas sekali, plaintif sendiri tidak pasti mengenai tarikh 'kontrak kedua'. Selanjutnya, ia adalah bercanggah bagi plaintif untuk mengatakan bahawa terdapat unsur penipuan yang memaksa plaintif kedua dan plaintif ketiga menandatangani surat aku janji tersebut namun masih mendakwa bahawa kontrak mengikat yang dikenali sebagai 'kontrak kedua' telah dibentuk pada mesyuarat 1 September 2022 atau 2 September 2022 di firma itu. Jelas sekali, rundingan lanjut untuk penyelesaian dibuat selepas itu, tetapi tidak dimuktamadkan (lihat perenggan 17–19).

(2) Defendan kedua dan ketiga hanya bertindak atas arahan defendan pertama, sebagai anak guam firma itu, berkenaan dengan sewa tertunggak oleh plaintif pertama kepada defendan pertama. Tambahan pula, defendan kedua, ketiga dan keempat tidak mengetahui perjanjian penyewaan antara plaintif pertama dan defendan pertama. Berkenaan dengan defendan keempat, ia adalah jelas bahawa defendan keempat bukan rakan kongsi firma itu sejak dia meninggalkan firma itu, sebelum permulaan saman ini. Oleh itu, defendan keempat tidak sepatutnya dinamakan sebagai pihak. Oleh itu, jelas jelas bahawa ini adalah kes yang sesuai untuk A18 k 19 KKM seperti yang diputuskan oleh HMS (lihat perenggan 20–21 & 23–24).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 1 MLRA 611; [1993] 4 CLJ 7; [1993] 2 AMR 1969, SC (refd)

Double Acres Sdn Bhd v Tiarasetia Sdn Bhd [2000] MLJU 477, HC (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259; [1996] 2 MLRH 631; [1996] 3 CLJ 695; [1996] 3 AMR 3000, HC (refd)

Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd [2013] 3 MLJ 511; [2013] 3 MLRA 114, CA (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 3 MLRA 144; [2016] 4 CLJ 665, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ

622; [2021] 4 MLRA 211; [2021] 4 CLJ 821, FC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 5 MLRA 175; [2013] 6 CLJ 673; [2013] 4 AMR 385, FC (refd)
Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 38; [1985] 1 MLRA 167; [1985] CLJ Rep 293, SC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 1 MLRA 263; [2018] 2 CLJ 641, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19, O 18 r 19(1)(b), (1)(c), (1)(d), O 55

(Bhavanash Sharma) for the appellant.
(Josephine, LK Chow & Co) for the respondent.

Suzana Muhamad Said JC:

INTRODUCTION

[1] This is an appeal against the decision of the learned sessions court judge in allowing the respondents' application (second defendant ('D2'), third defendant ('D3') and fourth defendant ('D4') to strike out the plaintiff's writ of summons and statement of claim ('SOC') under O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012 ('the ROC 2012') with costs.

[2] For ease of reference, the respective parties shall be referred to as the plaintiffs and defendants as they were in the sessions court.

BRIEF FACTS

[3] D1 is the owner of two premises with addresses at No 1 and 3 (fourth floor) (first premises) and No 5 (fourth floor) ('second premises'), Lorong 4/137C, Batu 5, Jalan Klang Lama, 58200 Kuala Lumpur ('premises').

[4] The first plaintiff ('P1') rented the first premises and second premises from D1 on 24 December 2020 and 15 February 2021, respectively ('tenancy agreements').

[5] The second plaintiff (P2) and the third plaintiff (P3) are directors of P1.

[6] The second defendant (D2) is an employee of Messrs Ngeow & Tan ('firm') and holds the position of a Chief Operating Officer ('COO') while the third defendant ('D3') is a partner of the firm.

[7] It was not disputed that P1 owed D1, the arrears in rental of the premises.

[8] On 29 August 2022, P1 received a notice of demand for the sum of RM287,299.20 for the arrears in rental from the firm as the solicitors representing D1.

[9] Later, P3 visited the firm's office on 1 September 2022, met D2 at the firm and requested for a longer period of time to settle the arrears.

[10] The next day, on 2 September 2022, P3 again, visited the firm's office and left a letter of guarantee that was signed by P2 and P3 as guarantors.

[11] The plaintiffs in their SOC stated that there was a contract made between P1 and D1 on either 1 September 2022 or 2 September 2022, which was referred as the 'second contract' in the SOC and the settlement conditions are binding upon D1.

[12] On the other hand, it was the contention of the defendants that P1 and D1 had never reached into any agreement to resolve or settle their disputes in respect of the outstanding rentals.

[13] Thereafter, a termination letter of the tenancy agreements was given to P1 on 5 October 2022.

FINDINGS AND ANALYSIS

Order 18 r 19 of the ROC 2012

[14] Order 18 r 19 of ROC 2012 provides:

> 19 Striking out pleadings and endorsements (O 18 r 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[15] The principle for striking out of pleadings pursuant to O 18 r 19 of the

ROC 2012 is well settled (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 1 MLRA 611; [1993] 4 CLJ 7; [1993] 2 AMR 1969, *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 38; [1985] 1 MLRA 167; [1985] CLJ Rep 293, *Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511; [2013] 3 MLRA 114 and *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259; [1996] 2 MLRH 631; [1996] 3 CLJ 695; [1996] 3 AMR 3000).

[16] Further, in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 5 MLRA 175; [2013] 6 CLJ 673; [2013] 4 AMR 385 (FC), it was held that 'where the claim on the face of it is obviously unsustainable, the claim should be struck out'.

[17] The plaintiffs brought this action and sued D2, D3 and D4, to be held liable for D1 pertaining to a settlement proposal which according to the plaintiffs, could either be on 1 September 2022 or 2 September 2022 (referred in the SOC as a 'second contract') which the plaintiffs regarded as a valid and binding contract against D1. It was apparent, that the plaintiffs themselves are not certain about the date of the 'second contract'.

[18] This court finds that it is contradictory for the plaintiffs to say that there was an element of fraud that forced P2 and P3 to sign the letter of undertaking and yet still claiming that a binding contract known as the 'second contract' was formed on that meetings of 1 September 2022 and 2 September 2022 at the firm.

[19] Obviously, further negotiations for settlements were made thereafter, but not concluded. Reference could also be made, particularly to the letters dated 29 August 2022 (conditional terms to halt the termination) and 26 September 2022 (Notice of Forfeiture by D1 to P1). The settlement negotiations were conducted by D2 and D3 while representing D1.

[20] Hence, D2 and D3 were only acting upon instructions of D1, being the firm's client, in regards to the rental in arrears owed by P1 to D1.

[21] Furthermore, D2, D3 and D4, are not privy to the tenancy agreements between P1 and D1.

[22] In this context, the case of *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* [2000] MLJU 477, held:

> Simply put, this doctrine means that only the original party to a contract may sue or be sued upon it. In other words, it is the original party that may enforce or be bound

by the terms of the contract. While the doctrine of privity of contract denies the third party of any right, it also prevents the third party from being held liable under the contract to which the third party is not a party thereto. In *Price v Easton* (1833) 4 B & Ad 433; *and in Tweddle v Atkinson* (1861) 1B & S 393, the courts there laid down a singular principle of law to this effect: that no one may be entitled to or be bound by the terms of a contract to which he is not the original party thereto.

[23] In regards to D4, it is also obvious that D4 is not a partner of the firm since he left on 9 July 2022, before the commencement of this Suit. Thus, D4 should not be named as a party.

[24] As such, based on the above reasons, it is plainly obvious that this is a case suitable for O 18 r 19 of the ROC 2012 as decided by the learned sessions court judge and for the reasons given by him in arriving to this decision.

[25] Accordingly, under O 55 of the ROC, this appeal is by way of a rehearing and this court has assessed and weighed all the evidence and laws placed before this court in its entirety. In this regard, for all the reasons aforesaid, this court finds that there is no merit in the plaintiff's appeal to warrant appellate intervention (see *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622; [2021] 4 MLRA 211; [2021] 4 CLJ 821 (FC), *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 1 MLRA 263; [2018] 2 CLJ 641 (FC), *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 and *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 3 MLRA 144; [2016] 4 CLJ 665).

[26] Thus, this appeal is dismissed with cost.

Appeal dismissed with costs.

Reported by K Selvaraju